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25 UNITED STATES DISTRICT COURT
26
27 NORTHERN DISTRICT OF CALIFORNIA
28
29 SAN JOSE DIVISION

30 In re: County of Monterey Initiative Matter

31 and

32 In re: Monterey Referendum

33 } Case Nos.: C 06-01407 JW
34 } C 06-02202 JW
35 } (Related Cases)

36 } **COUNTY DEFENDANTS'**
37 } **MEMORANDUM OF POINTS AND**
38 } **AUTHORITIES IN OPPOSITION TO**
39 } **MELENDEZ PLAINTIFFS' MOTION**
40 } **FOR REMAND AND RANCHO SAN**
41 } **JUAN PLAINTIFFS MOTION FOR**
42 } **SUMMARY JUDGMENT; AND IN**
43 } **RESPONSE TO RANGEL PLAINTIFFS'**
44 } **MOTION FOR SUMMARY**
45 } **JUDGMENT**

46 } Date: February 27, 2007
47 } Time: 9:00 a.m.
48 } Judge: Hon. James Ware
49 } Courtroom: 8

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1 **I. INTRODUCTION**

2 **A. The *Melendez* Plaintiffs' Motion to Remand Should Be Denied and the**
 3 ***Melendez* Case Should Be Dismissed as Moot**

4 As anticipated in the County of Monterey opening brief, the *Melendez* Plaintiffs request
 5 remand to the state courts. And, as explained in that opening brief, the request should be denied,
 6 because Plaintiffs have attained all of the relief they requested. With their lawsuit, Plaintiffs
 7 sought to have placed on the ballot a particular initiative, the "Monterey County Quality of Life,
 8 Affordable Housing, and Voter Control Initiative" (the "Initiative"). They have achieved that
 9 goal: the County of Monterey has agreed and resolved to have the Initiative placed on the June
 10 ballot. Plaintiffs have no other claims – state law-based or otherwise – to pursue in this matter.
 11 Plaintiffs should not be permitted to waste any more judicial resources on requests for relief that
 12 has already been attained. Plaintiffs attempt to raise an alleged jurisdictional issue but this is
 13 and should be treated as nothing more than an attempt to deflect from what has actually
 14 happened: removal was properly effected and completely relief was subsequently accorded to
 15 the Plaintiffs. No case or controversy exists. The action should be dismissed as moot.

16 **B. Rancho San Juan Plaintiffs' Motion for Summary Judgment Should Be**
 17 **Denied and the County's Motion For Summary Judgment in The**
 18 **Referendum Cases Should Be Granted**

19 Perhaps the only point of agreement the defendants have with the summary judgment
 20 motion of plaintiffs Rancho San Juan Opposition Coalition, Citizens for Responsible
 21 Government, and Julie Engell (collectively "RSJOC,") is that this case boils down to a
 22 straightforward legal question: does §203 of the Federal Voting Rights Act ("FVRA") require
 23 that a referendum election in Monterey be conducted in Spanish. Most importantly, defendants
 24 do not agree that the issue was decided in the *en banc* decision, *Padilla v. Lever*, 463 F.3d 1046,
 25 1048 (9th Cir. 2006) (*en banc*). In that case involving recall petitions, the panel studiously
 26 avoided deciding the issue of whether FVRA applied to referendum petitions. And if one
 27 reviews the reasoning of the *en banc* panel's decision, that the recall petition was not governed
 28

1 by FVRA because it was not provided by the government, that reasoning leads to a different
 2 result in referendum cases because referendum petitions are almost entirely provided by the
 3 government.

4 The plaintiffs are extremely aggressive in not wanting Spanish speaking voters to see the
 5 petition in Spanish. Oddly, while they are liberal in throwing around strong rhetoric in their
 6 memorandum of points and authorities about the venality of everyone else, they fail to supply
 7 any evidence of how the petition could be understood by its limited English signers. But the
 8 County does not have the luxury of excluding a set of voters that FVRA says should not be
 9 excluded from the process. It has to balance the demands of one advocacy group that wants to
 10 see Spanish speaking voters excluded from the process against those wanting to be included.
 11 And, in the absence of any governing judicial authority, it has to make a judgment call about
 12 what the law means and whether to proceed with the election or not.

13 This case boils down to whether the plain language of FVRA requires the referendum
 14 petition to be in Spanish. The guidance of the *en banc* panel's decision in *Padilla* says that it
 15 does, and that analysis is supported by the most relevant available interpretive aids. Section 203
 16 of FVRA raises two basic questions: (i) whether the petition constitutes materials or
 17 information relating to the electoral process under § 203 and (ii) whether the petition is of the
 18 type of material or information provided by the State or a political subdivision. *Padilla*, 463
 19 F.3d at 1048. The referendum procedure in California falls squarely within both of these tests,
 20 such that § 203 does apply to the circulation of referendum petitions. RSJOC's Motion for
 21 Summary Judgment should be denied.

22 C. The *Rangel* Plaintiffs' Motion Should be Granted

23 The defendants do not object to the *Rangel* plaintiffs' motion for a three judge court. Nor
 24 do defendants oppose the *Rangel* plaintiffs' motion for a summary judgment, for the same
 25 reason they oppose RSJOC's. However, no injunction is necessary to force the County to keep
 26 the referendum off the ballot, since the County is not threatening to place it on the ballot.

1 **II. THE MELENDEZ CASE SHOULD NOT BE REMANDED, BUT RATHER**
 2 **DISMISSED BECAUSE IT IS MOOT**

3 The County and the *Melendez* Plaintiffs disagree on one fundamental issue: Should the
 4 County's agreement to place the Initiative on the ballot in the upcoming June election require
 5 dismissal of this action as moot or force a remand to state law court? Under the law and the
 6 facts, the answer is not a close call. The *Melendez* action should be dismissed as moot. There
 7 are no claims left to be resolved, and the alleged jurisdictional issue raised by Plaintiffs has no
 8 legal or factual basis.

9 **A. Because There Are No Claims Left To Be Resolved In The *Melendez* Matter,**
 10 **It Must Be Dismissed As Moot.**

11 Because the *Melendez* plaintiffs tell so little of what their position is, it is difficult to
 12 respond. However, the erroneous approach taken by the *Melendez* plaintiffs seems to be based
 13 upon three very basic, but partially unspoken misconceptions. (i) That a federal court has no
 14 power to dismiss this action as moot; (ii) That there are state causes of action left to be litigated;
 15 and (iii) That the Board's decision to place the initiative on the ballot creates a problem with the
 16 removal that took place in *Melendez* and thus this Court is somehow deprived of jurisdiction.
 17 Plaintiffs are in error with all three of these unspoken premises.

18 First, the Court plainly has the power to dismiss this action as moot. Quite simply, nothing
 19 in this case remains to be resolved and so it should be dismissed. Plaintiffs do not dispute that the
 20 County has already resolved to place the Initiative on the ballot in the upcoming June election. *See*
 21 Plaintiffs' Memo. of Pts. and Auth.'s, 11:19-22. When the County so resolved, Plaintiffs received all
 22 the relief that they had ever sought in their complaint/petition in the *Melendez* action.

23 Under these circumstances, where there is no actual controversy, the proper procedure for
 24 the Court is to dismiss an action as moot. *See Morcote v. Oracle Corp.*, 2005 U.S. Dist. LEXIS
 25 31898, *13 (N.D. Cal. 2005), citing *Allard v. De Lorean*, 884 F.2d 464, 466 (9th Cir. 1989). In
 26 the similar case of *People ex rel. Lockyer v. United States Forest Service*, 2006 U.S. Dist.
 27 LEXIS 53430 (N.D. 2006), the Court dismissed the action as moot. In that case, even after the
 28

1 U.S. Forest Service notified the Court of its decision to withdraw its Fire Plan, plaintiffs still
 2 sought to enjoin the U.S. Forest Service from issuing a Fire Plan unless the Forest Service fully
 3 complied with the National Environmental Policy Act. In his decision to dismiss, Judge Breyer
 4 noted that the "steadfast requirement" of a case or controversy is "borne out of a court's duty to
 5 avoid rendering advisory opinions." *Id.* at **3-4. The Court further stated,

6 Under Article III of the United States Constitution a foundational predicate to the
 7 exercise of judicial power is that a "case or controversy" must exist for the
 8 duration of an action. See, e.g., United States Parole Comm'n v. Geraghty, 445
U.S. 388, 397, 100 S. Ct. 1202, 63 L. Ed. 2d 479 (1980). A case is moot where
 9 "the issues presented are no longer 'live' or the parties lack a legally cognizable
 10 interest in the outcome." Id. at 396 (quoting Powell v. McCormack, 395 U.S. 486,
496, 89 S. Ct. 1944, 23 L. Ed. 2d 491 (1969)). The Ninth Circuit has stated that the
 11 "basic question in determining mootness is whether there is a present controversy
 12 as to which effective relief can be granted." Northwest Environmental Defense
Center v. Gordon, 849 F.2d 1241, 1244 (9th Cir. 1988). A court sitting in equity
 13 deciding a mootness issue must not consider whether the "precise relief sought at
 14 the time the application for an injunction was filed is still available" but "whether
 15 there can be *any* effective relief." Id. at 1244-45 (emphasis in original). *Id.* at * 3.

16 Similarly, this case has become moot and should be dismissed.

17 Second, there are no state law causes of action. Contrary to Plaintiffs' unfounded
 18 argument for remand, no causes of action, based on state law or otherwise, remain for
 19 disposition by this Court or a state court. In their Complaint, Plaintiffs sought no relief other
 20 than sending the Initiative to election. Tellingly and not surprisingly, Plaintiffs never specify in
 21 their 32-page brief just what state law causes of action must be resolved, because there are no
 22 such causes of action remaining to be resolved. They merely vaguely state that this case "must
 23 be remanded for appropriate resolution of plaintiffs' state law causes of action and for final
 24 disposition of the case in accordance with California law," without once specifying what they
 25 could possibly mean by "state law causes of action." See Plaintiffs' Memorandum of Points and
 26 Authorities, 13:10-12. Perhaps they are thinking of the various state law defenses that the
 27 County defendants raised, in addition to the federal law issue, the Federal Voting Rights Act
 28 ("FVRA"). But all those defenses as well as the FVRA-based defense became moot when the

1 Board put the Initiative on the ballot. While it is true that the state law defenses, which went to
 2 the substantive legality of the proposed measure, will continue to exist should the measure ever
 3 pass, the only state law cause of action that was ever raised in this case was one to get the matter
 4 placed on the ballot. That cause of action has become moot and should be dismissed.

5 Third, the mootness creates no issue with respect to the correctness of the removal. This
 6 is explained in the following section, II.B.

7 In sum, Plaintiffs in the *Melendez* case have failed to address any of the relevant issues
 8 and wholly misconstrue the situation. The case should simply be dismissed as moot; remand to
 9 state court is pointless.

10 **B. In The Event The Court Does Not Dismiss This Matter, The Court Should
 11 Retain Jurisdiction.**

12 The removal of this action to federal district court was proper. The case was properly
 13 removed pursuant to 28 U.S.C. § 1443(2). The subject matter of this action qualified it for
 14 removal. Under Section 1443, a defendant may remove a civil action from state to federal court
 15 “[f]or any act under color of authority derived from any law providing for equal rights, or for
 16 refusing to do any act on the ground that it would be inconsistent with such law.” Defendants
 17 were sued for refusing to place the Initiative on the ballot in part because it would have been
 18 inconsistent with FVRA. There was no doubt that a “colorable conflict” existed between state
 19 and federal law under the then existing opinion in *Padilla v. Lever*, 429 F.3d 910 (9th
 20 Cir. 2005). The County would have been in violation of FVRA’s bilingual and pre-clearance
 21 provisions were it to have put the matter on the ballot at that time, as this court later found.
 22 Courts which had reviewed the matter had said voting rights cases are subject to § 1443(2).
 23 *Wachtler v. Cuomo*, 1991 U.S. Dist. LEXIS 17069 at *10. See, also, *Smith v. Winter*, 717 F.2d
 24 191, 194 (5th Cir. 1983); *Sexson v. Servaas*, 33 F.3d 799, 801 (7th Cir. 1994). Accordingly, there
 25 is no doubt that removal under 28 U.S.C. § 1443 was proper.

26 The Board has now decided, in light of the reversal of *Padilla* in the Ninth Circuit, that it
 27 is prudent to place the Initiative on the ballot. That does not change the fact that it was removed
 28

properly and this Court has jurisdiction. Once a case is properly removed, the federal court has jurisdiction over it. *See* 28 U.S.C. §§ 1367, 1441, 1443, 1446, 1447. Just because the whole case has become moot does not deprive the Court of jurisdiction to dismiss it under any theory (*id.*); in any event, none is cited by plaintiffs.

Indeed, in a removed case, even if a federal cause of action had been dismissed, leaving only state causes of action, this Court would still have discretionary jurisdiction to decide the ancillary state causes of action. *See Acri v. Varian Assocs.*, 114 F.3d 999, 1000 (9th Cir. 1997); *Kohler v. Inter-Tel Techs.*, 244 F.3d 1167, 1170 (9th Cir. 2001). Specifically, 28 U.S.C. § 1367(c) provides that the district court may or may not decline to exercise supplemental jurisdiction in the event that “the district court has dismissed all claims over which it has original jurisdiction.” 28 U.S.C. § 1367(c)(3). *A fortiori*, as here where all claims have been mooted including the state causes of action and defenses, this Court has jurisdictional power to dismiss the action as moot.¹

Plaintiffs cite several cases, none of which apply. While they may provide examples of removals that were found by the Court to be improper, here, in contrast, the removal under 28 U.S.C. § 1443(2) was indisputably proper. Plaintiffs have cited no authority discussing an instance where remand was ordered following a removal effected properly pursuant to 28 U.S.C. § 1443(2). They have made no legal or factual showing as to why the supplemental jurisdictional statute would not operate to allow this Court to exercise its discretion and retain jurisdiction.

C. Conclusion

The *Melendez* Plaintiffs have now attained what they ultimately sought in this lawsuit. In

¹ If it is a claim for attorneys’ fees that plaintiffs are worried about, they have it wrong there as well. Except for the drafting of the original petition/complaint in state court, the entire litigation has taken place in this Court. Moreover, the proper court for determining attorneys’ fees in removal is the federal district court. 28 U.S.C. § 1447(c).

light of the County's agreement to place the Initiative on the June 2007 ballot, Plaintiffs' lawsuit should be dismissed as moot, and if it is not dismissed pending the election in June, this Court should retain jurisdiction of the matter providing Plaintiffs with an avenue for seeking appropriate relief should that ever be necessary. For all of the foregoing reasons and those set forth in the County's opening brief, the Court should deny Plaintiffs' Motion.

III. THE *RANCHO SAN JUAN* PLAINTIFFS" MOTION FOR SUMMARY JUDGMENT IN THE REFERENDUM CASES SHOULD BE DENIED

A. Facts Relevant to Summary Judgment in the Referendum Cases

The County discussed the background of this dispute in the memorandum in support of its own summary judgment motion, presently before the Court, and therefore will not repeat that discussion here. In the end, the key facts necessary for summary disposition are the referendum petition and the fact it was not circulated in any language but English. That it was not circulated in English was stipulated by RSJOC.

B. Section 203 Of The FVRA Must Be Broadly Construed To Require Translation Of A Referendum Petition Into Spanish In Monterey County.

RSJOC's motion boils down to the meaning of § 203 of the Federal Voting Rights Act ("FVRA"). That statute states:

Whenever any State or political subdivision subject to the prohibition of subsection (b) of this section provides any registration or voting notices, form, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable minority group as well as in the English language.

42 U.S.C. § 1973aa-1a(c).

Under the applicable federal regulations, the County is "subject to the prohibition of subsection (b)." 28 C.F.R. § 55, App. (2005) (identifying the County as being subject to the multilingual requirements of § 203, and in particular the Spanish heritage requirements). The obligations thereby imposed on counties such as Monterey are further expounded in the regulations as follows:

The requirements of ... 203 (c) apply with regard to the provision of “any registration or voting notices, forms, instructions, assistance or other materials or information relating to the electoral process, including ballots.” ... Accordingly, the quoted language should be broadly construed to apply to all stages of the electoral process, from voter registration through activities related to conducting elections, including the issuance, at any time during the year, of notifications, announcements, or other informational materials concerning the opportunity to register, the deadline for voter registration, the time, places and subject matters of elections, and the absentee voting process.

28 C.F.R. § 55.15. Pursuant to these provisions, voting materials should be conveyed in Spanish, in addition to English, so that all the electorate may participate effectively in the process.

Supreme Court precedent mandates that this Court broadly construe the FVRA. *See Allen v. State Bd. Of Elections*, 393 U.S. 544, 565-66 (1969) (stating that FVRA gives a broad interpretation to the right to vote and recognizing that voting includes “all action necessary to make a vote effective”). In enacting the bilingual election requirements, Congress made an explicit finding that “language minorities had been effectively excluded from participation in the electoral process,” necessitating remedial action “to enforce the guarantees of the 14th and 15th amendments.” 42 U.S.C. § 1973aa-1a(a). This authority requires a broad view of the applicability of the FVRA to state elections. Applying the FVRA’s bilingual mandates to referendum petitions will further Congress’ goal of ensuring broad participation in the electoral process.

With respect to petitions, *Padilla* guides us in pointing out that there are two basic questions: (i) whether the petition constitutes “registration or voting notices, form, instructions, assistance, or other materials or information relating to the electoral process, including ballots” under § 203 and (ii) whether the petition is of the type of material or information provided by the State or a political subdivision. *Padilla* at 1048. The answer to both questions is yes as discussed in the following.

1 **C. The Referendum Petition And Associated Forms Are “Provided” By The**
 2 **State Or Its Subdivision.**

3 Referendum petitions in California are provided by the State or its political subdivision
 4 within the meaning of § 203, and therefore such petitions meet the first element of that statute.
 5 That is because virtually every part of each such petition is provided by either the State or its
 6 subdivision.

7 In addressing the parallel question with respect to recall petitions, the *en banc* panel
 8 concluded that type of petition was not provided by the State or its subdivision within the
 9 meaning of § 203. But the very grounds that it stated led to that decision demonstrate why in
 10 contrast a referendum petition is to be deemed provided by the State or its subdivision.

11 It is true that California regulates recall petitions in some
 12 detail. The petitions must follow a format provided by the Secretary
 13 of State, and must use a minimum type size. (Citation omitted.) The
 14 petition also must include a copy of the Notice of Intention, the
 15 statement of grounds for recall, and the answer of the targeted
 16 officer if the officer submitted one. (Citation omitted.) But these
 17 regulations do not mean that the petitions are *provided* (emphasis in
 18 original by the State or subdivision. The form is regulated by the
 19 State, but the proponents fill out the petition, supply the grounds of
 20 recall, and have the petitions printed at their own expense. The fact
 21 that, under [California law], the Secretary of State “provides” the
 22 format does not mean that the State “provides” the petitions
 23 themselves within the meaning of the Voting Rights Act.

24 The plaintiffs argue that, because the election officials are
 25 charged under state law with ascertaining whether “the proposed
 26 form and *wording* (emphasis in original) of the petition meets the
 27 requirements of this chapter[,] (citation omitted), they are dictating
 28 the content of the petitions to the degree that the petitions may be
 29 said to be “provided” by the County. **But there is nothing in the**
chapter governing elections that specifies the actual wording
that proponents must use, for example, in stating their grounds
for recall. Nor does the record contain any hint that the
elections officials determine the contents of the petition; they
merely make sure that the petitions are in the form specified by
statute. (Emphasis provided.) It is not reasonable to hold that this
 30 regulatory process transforms petitions privately initiated, drafted,
 31 and circulated by the proponents into petitions “provided” by the
 32 County for purposes of the Voting Rights Act. *Padilla* at 1051.

In other words, *Padilla* instructs that the government regulation over the form and process is important, but not enough—the government must also provide the contents of the petition to fall within § 203. Similarly to recall petitions, referendum petitions conform to pervasive state regulation as to form, and impose the same requirements upon local government to insure the process is carried out correctly and properly. But in contrast to recall petitions, for referenda the County provides virtually every word of the petition. An examination of Exhibit D shows that the petition consists of two types of things: words to fill in the form that may be provided by the petition drafters, but are in fact dictated by State law as to what they must say; and the substance of the petition itself, which consists of the resolution at issue and which was provided entirely by the State's subdivision, the County of Monterey. Unlike a recall petition where the State provides the form but not the substance, the government here provides both the form and the substance. Each of these elements is discussed in more detail.

1. The State or Its Subdivision Regulates the Form and Process of a Referendum Petition.

In California's referendum process, ordinances may be subject to a referendum petition within 30 days of the ordinance being adopted. Cal. Elec. Code §§ 9141, 9144. The petition must be duly signed by only 10% of the voters in the County in the last gubernatorial election. *Id.*, § 9144. When presented to the Board, a vote must be taken as to whether to appeal the ordinance or not. *Id.* If not entirely repealed, the ordinance is then placed on the ballot for a majority vote.

Under the California electoral system the State or its subdivision provided the referendum petition within the meaning of FVRA. To begin, there is elaborate government involvement in all aspects of the process. The government plays an integral role in regulating, approving, monitoring, and, ultimately, in administering referendum elections. *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 833 (9th Cir. 1986) ("That the state or a political subdivision has mandated by law that certain preliminary steps be taken by the would-be voter, the candidate for

1 office, or the proponents of an issue does not in any sense absolve the governmental entity of its
 2 responsibility under the Voting Rights Act"). Indeed, this heightened level of control that
 3 extends to the beginning of every referendum process is enshrined in the numerous statutory
 4 requirements governing conduct, well before the point where petition signatures are certified.
 5 See Cal. Elec. Code §§ 9140 *et seq.*; *see also id.* at § 9146 (the provisions of the Elections Code
 6 relating to the form of petitions, the duties of county elections officials, and the manner of
 7 holding elections in *initiative* matters also govern the procedures in *referendum* matters). The
 8 state mandates the specific format that county referendum petition proponents are required to
 9 use. See Cal. Elec. Code § 9147(a) ("The heading of the proposed referendum shall be in
 10 substantially the following form: 'Referendum Against an Ordinance Provided by the Board of
 11 Supervisors'"). The Code also requires that a copy of the title and text of the ordinance being
 12 referenced be attached to the petition. *Id.*, § 9147(b).

13 That the government has an integral part is further evidenced by the large role it plays in
 14 ensuring that referendum petitions conform to statutory requirements. In addition to the above-
 15 referenced code sections specifying the form and content of the referendum petition, the Code
 16 imposes highly specific requirements as to the information required of petition signers. *Id.* at
 17 § 9020 (incorporated into the referendum petition process by sections 9101 and 9146). It
 18 imposes time limits on when the petition may be filed in order to halt effectiveness of the
 19 relevant ordinance. *Id.* at § 9141, 9144 (ordinances become effective 30 days after passage
 20 unless a referendum petition protesting its adoption becomes effective). The local elections
 21 officer, in this case the Registrar of Voters, is required by the Code to examine and verify the
 22 number of valid signatures on the petition, and is provided with detailed direction on how to do
 23 so. *Id.* at § 9113-9115. The political subdivision may have to reject the petition if it does not
 24 comply with the Code. *See, e.g. Myers v. Patterson*, 196 Cal.App.3d 130, 136 (1987) (regarding
 25 initiative petition).

1 **2. The State or Its Subdivision Also Provides the Content of the**
 2 **Referendum Petition.**

3 *Padilla* said of recall petitions:

4 **But there is nothing in the chapter governing elections that**
 5 **specifies the actual wording that proponents must use,** for
 6 example, in stating their grounds for recall. Nor does the record
 7 contain any hint that the elections officials determine the contents of
 8 the petition; they merely make sure that the petitions are in the form
 9 specified by statute. *Padilla* at 1051 (emphasis added).

10 Therein lies the primary difference between recall and referendum petitions. In the latter, the
 11 government does specify the actual wording of the petitions: the text is the ordinance or (here)
 12 resolution at issue. The resolution that is the entire object of the petition here was drafted and
 13 adopted by the County in the first place. Since the Resolution is the substantive part of the
 14 petition, the petition too is provided by the government. There is no substantive part of the
 15 petition that is provided by the petition circulators—it is provided entirely by the State's
 16 subdivision. Putting that together with the State's thorough regulation of the process, there is no
 17 part of the petition that is not provided by the government. The only thing that the circulators do
 18 is print and circulate the petition, but, as the language quoted immediately above from *Padilla*
 19 points out, the critical question is who "specifies the actual wording that proponents must
 20 use...." And there is no doubt that is the County. The reasoning of *Padilla* dictates that FVRA
 21 applies.

22 **3. The Referendum Process May Substitute for the Election.**

23 Although not directly addressed by the *Padilla* panel, one thing that might be said of
 24 recall petitions is that at least minority language voters might ultimately get a chance to vote in
 25 an actual election. The same cannot be said of referendum. That is, the petition circulation
 26 process might constitute the entirety of the process in which voters participate.

27 A unique part of the referendum process is that the process itself may result in the
 28 passage of the legislation prayed, repeal of the ordinance, without an actual election. Cal. Elec.
 29 Code §§ 9141, 9144. Thus it cannot be said that any problems will be cured by simply having a

1 translation available at election time. The effect of the petition may be that, upon
 2 reconsideration, the Board eliminates the ordinance. If that happens, the law will have been
 3 changed by the 10% who signed the petition, not the 50% majority who voted one way or
 4 another on the ordinance itself. The petition signers then become the part of the electorate that
 5 is making decisions about the ordinance, not the fuller set of actual voters. Thus non-English
 6 speaking voters will have been eliminated from this process altogether.

7 **4. RSJOC's Primary Argument Is Largely Based Upon Flawed Logic.**

8 The primary argument advanced by RSJOC is that *Padilla* decided the issue with respect
 9 to all types of petitions. That is certainly not true, as one can easily discern from reading
 10 *Padilla*. The decision carefully steers away from discussing other types of petitions and
 11 expressly limits its holding to recall petitions. RSJOC's arguments are simply a branch of the
 12 basic logical fallacy that apples are fruits, oranges are fruits, therefore apples are oranges.
 13 Recall petitions are simply not the same as referendum petitions, nor indeed the same as
 14 initiative petitions. Of the three types, recall petitions clearly have the least material provided
 15 by the State or its subdivision. Thus when the original *Padilla* decision determined that recall
 16 petitions were subject to § 203, it was a simple step to apply that decision to initiative and
 17 referendum petitions, which contain an even greater amount of material provided by the
 18 government. But the same cannot be said about the *en banc* decision, because the other types of
 19 petitions provide a much stronger case for application of the FVRA.

20 That is not to say the reasoning of the *en banc* panel's decision is not important, because
 21 it does interpret § 203 and therefore provides guidelines for other types of petitions. But one
 22 must examine the reasoning, not just say that because the 9th Circuit made a decision with
 23 respect to recall petitions, that necessarily applies to referenda.

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Nor does it help RSJOC to cite cases² from other circuits, under other states' laws and procedures, involving a totally different process, the initiative process. Since the 9th Circuit has provided its interpretation in *Padilla*, that is the controlling authority. Were the cases from other jurisdictions referenda cases, and were the statutes in those states similar to California, then perhaps they might be helpful guidelines. But neither is true and so the cases are simply inapposite. Similarly, the review of Judge Collins' unpublished decision prior to the *en banc* panel's decision provides no helpful guidance. She was interpreting the law prior to the current statements of the 9th Circuit in *Padilla*. In that regard, the language they quote does not address the central requirement derived from the *Padilla* case, that the substantive material be provided by the government. Had the *Padilla* decision been extant at the time, Judge Collins may have reached the opposite conclusion.

Finally, RSJOC attempts to make some practical arguments based on some of the statements in *Padilla*. The language from *Padilla* explained that some practical considerations supported its actual holding as to recall elections—but it was not the holding of the case. The critical holding, as already quoted, is:

But there is nothing in the chapter governing elections that specifies the actual wording that proponents must use, for example, in stating their grounds for recall. Nor does the record contain any hint that the elections officials determine the contents of the petition; they merely make sure that the petitions are in the form specified by statute. (Emphasis provided.) It is not reasonable to hold that this regulatory process transforms petitions privately initiated, drafted, and circulated by the proponents into petitions “provided” by the County for purposes of the Voting Rights Act. *Id.* at 1051.

That addresses the central issue of the cases: What does provided by the State mean? There is no part of § 203 that says one complies with § 203 only if it is practical or convenient; the Court’s discussion of practical issues then was not part of the holding, but merely part of its reasoning to seek to glean the intent of the statute. But where as in the case of a referendum

² *Montero v. Meyer*, 861 F.2d 603 (10th Cir. 1988); *Delgado v. Smith*, 861 F.2d 1489 (11th Cir. 1988).

1 petition the entirety of the petition is provided by the State or its subdivision, the practical issues
 2 are irrelevant.

3 Nor was there any serious practical barrier here. Perhaps it would have been slightly
 4 inconvenient to translate 14 pages into Spanish, but hardly impossible. Self evidently that could
 5 have been done in less than a day and the 30 day deadline for circulating a petition is thus hardly
 6 a barrier.

7 **D. Referendum Petitions, Forms And Associated Documents Constitute**
 8 **“Materials Or Information Relating To The Electoral Process.”**

9 *Padilla* provided no guidance with respect to the second criterion, whether the
 10 referendum petition constitutes any of “registration or voting notices, forms, instructions,
 11 assistance, or other materials or information relating to the electoral process, including
 12 ballots....” FVRA § 203 (42 U.S.C. § 1973aa-1a(c)). Fundamentally RSJOC does not address
 13 the issue in its moving papers, and so the County defendants will deal with it only briefly here.
 14 In the County’s motion for summary judgment there is a detailed discussion why the petition
 15 does constitute election materials, and the Court is therefore respectfully referred to that
 16 discussion.

17 Very briefly in summary: FVRA applies to “registration or voting notices, form,
 18 instructions, assistance, or other materials or information relating to the electoral process,
 19 including ballots....” *Id.* A “form” is a “printed or typed document with blank spaces for
 20 insertion of required or requested specific information.” *See Merriam Webster’s Collegiate*
21 Dictionary, at 458 (10th ed. 1996). A referendum petition easily fits that description. *See, e.g.*,
22 Cal. Elec. Code § 9147(a) (“The heading of a proposed referendum measure shall be in
 23 substantially the following *form*: ‘Referendum Against an Ordinance Provided by the Board of
 24 Supervisors’”) (emphasis added). Further, the statutes require that referendum proponents
 25 attach a copy of the ordinance to be referenced to the above-referenced form. *See Id.*,
26 § 9147(b). There can be no serious dispute that the ordinance being referenced constitutes
27 “other materials or information relating to the electoral process.” It is the very reason for the
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1 election.

2 **E. The Legislative History Of Section 203 Supports These Conclusions.**

3 The legislative history of the FVRA mandates a broad interpretation. For example, in its
 4 report on the bilingual amendment, the Senate specifically expressed concern that language
 5 minorities exerted little influence or control over the election or appointment of local officials
 6 due to language barriers. Sen. Rep. No. 94-295 (1975) (Req. Jud. Not., Ex. B, p. 14). It strains
 7 reason to suggest that persons who initiate or sign referendum petitions are not participating in
 8 the “electoral process” or are not exercising some “control over [an] election,” especially when
 9 it might never reach the voters.

10 Congress was aware before renewing FVRA that decisions such as *In re Monterey*
 11 *Initiative Matter* and the initial *Padilla* decision existed. Req. for Jud. Not., Ex. C. Indeed,
 12 there was even an amendment offered to change FVRA to exclude petitions explicitly. *Id.*,
 13 pp. 23-24. Despite that fact, Congress chose to renew FVRA without amendment. Under well-
 14 recognized principles of statutory construction, this supports an argument that Congress was
 15 aware of and acquiesced in an interpretation of the Act that required translating petitions into
 16 other languages. See *Dougherty County Board of Education v. White*, 439 U.S. 32, 38 (1978);
 17 *U.S. v. McNab*, 331 F.3d 1228, 238 (11th Cir. 2003) (may look at fact amendments were offered
 18 during legislative history); *Roger v. Frito-Lay, Inc.*, 661 F.2d 1074, 1080 (5th Cir. 1980).

19 RSJOC cites a committee report. RSJOC’s Memorandum in Support Summary Judgment
 20 Motion, at p. 22. The report is at best ambiguous for purposes relevant here, stating that it
 21 believes FVRA does not apply to privately prepared and circulated materials, but does not
 22 specify of what these consist. It begs the question here, which is whether referenda are solely
 23 privately circulated materials or instead are provided by the State or its subdivision.³ The report
 24 does show Congress was aware of the general issue and therefore is damaging to RSJOC’s
 25 position because Congress chose to do nothing to clarify FVRA. Even more persuasive is the

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 28 ³ The quoted piece certainly does not say that where petitions are provided by the State or its
 subdivision they should not be translated.

fact that when Congress had the chance to address that issue in the proposed amendment discussed above, the amendment was rejected. In the end the legislative history undermines RSJOC's position.

F. Deference Should be Accorded to the United States Attorney General's Interpretation of Section 203.

The Attorney General's ("AG") reasonable interpretation of the statute must be accorded deference. *See United States v. Sheffield Bd. Of Comm'rs*, 435 U.S. 110, 131-32 (1978) (recognizing that because of the AG's "key role" in the formulation of the FVRA the United States Supreme Court has "given great deference to his interpretations" of the statute). The Court might also note that Congress has revisited the act three times (in 1982, 1992 and 2006) since the AG's regulations were issued shortly after the act's passage in 1975, and also acquiesced in the AG's interpretations of the act as applying to petitions of all kinds (see below). Cf. *Pleasant Grove v. United States*, 479 U.S. 462, 468 (1987) (awareness of AG view on the scope of section 5 of the same act).

The AG's guidelines regarding section 203 provide in pertinent part as follows:

(a) Types of materials. ... A jurisdiction required to provide minority language materials is only required to publish in the language of the applicable minority group materials distributed to or provided for the use of the electorate generally. Such materials, for example, ballots, sample ballots, informational materials, and *petitions*.

28 C.F.R. § 55.19(a) (emphasis added). Contrary to RSJOC's argument not only does this explicitly cover *petitions*, but it provides that any material "distributed to or provided for the use of the electorate generally" is also covered. Any petition is by definition distributed to the electorate generally, because it can only be signed by registered voters of the jurisdiction. See Cal. Elec. Code § 9144. Notably, the *en banc* panel said it was not convinced this section applied to recall petitions, but did not discuss referendum petitions. In fact, the Justice Department has made clear it understands referendum petitions to fall under FVRA's purview (see 28 C.F.R. § 51.22.) There is thus no such ambiguity pertaining to referendum, as the *en banc* panel surmised with respect to recall.

1 Also, the regulations elsewhere evidence the AG's interpretation of §203 as applying to
 2 materials and activities other than merely casting the ballot.

3 The basic purpose of these requirements is to allow members of
 4 applicable language minority groups to be effectively informed of
 5 and participate effectively in *voting-connected* activities.

6 Accordingly, the quoted language should be broadly construed to
 7 apply to *all stages of the electoral process*, from voter registration
 8 through activities related to conducted elections, including, for
 example the issuance, at any time during the year, of notifications,
 announcements, or other informational materials concerning the
 opportunity to register, the deadline for voter registration, the time,
 places and subject matters of elections, and the absentee voting
 process.

9 29 C.F.R. § 55.15 (emphasis added).

10 **IV. THE COUNTY DEFENDANTS HAVE NO OBJECTION TO THE RELIEF
 11 REQUESTED BY THE *RANGEL* PLAINTIFFS**

12 As is apparent, the County Defendants have concluded that the *Rangel* plaintiffs have the
 13 better argument. Therefore they have no objection in general to summary judgment being
 14 granted on their motion. Further, they have no objection to this being referred to a three judge
 15 court.

16 However, it is not necessary to grant the *Rangel* plaintiffs an injunction against the
 17 County. An injunction should be granted only if the harm which the plaintiffs' fear is being
 18 threatened. The harm would be the County placing the referendum election on the ballot. The
 19 County has not threatened to do that and in fact has agreed with the *Rangel* plaintiffs in this
 20 litigation.

21 **V. CONCLUSION**

22 The *Melendez* case is moot and accordingly should be dismissed.

23 Unlike the recall petition in *Padilla*, the referendum petition at issue is almost completely
 24 provided by the government, and there is a virtual absence of any drafting by the proponents.
 25 Under the state law, the resulting change in the local law can be accomplished by as few as 10%
 26 of the registered voters within the jurisdiction, without ever holding an election, a process that
 27 effectively excludes those to be assisted by the FVRA. The motion of RSJOC should be denied;

1 that of the County defendants and the Rangel Plaintiff should be granted.

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3 Dated: February 13, 2007

NOSSAMAN, GUTHNER, KNOX & ELLIOTT, LLP

4
5 BY: _____ / S /
6 STEPHEN N. ROBERTS
ATTORNEYS FOR DEFENDANTS